Office-Supreme Court, U.S.
FILED
NOV 14 1962
JOHN F. DAVIS, CLERK

No. 519

In the Supreme Court of the United States

OCTOBER TERM, 1962

MOORE-McCORMACK LINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
FORREST A. HETHERINGTON,
Deputy Assistant Attorney General,
ALAN S. ROSENTHAL,
DAVID L. MCGARRITY, Jr.,
Attorneys,
Department of Justice,
Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and conventions involved	2
Statement	4
Argument	7
Conclusion	11

CITATIONS

Cases:

Balt. & Ohio R.R. v. *United States*, 261 U.S. 592	8
Banco de Espana v. *Federal Reserve Bank*, 114 F. 2d 438	9, 10
Chesapeake &c. Tel. Co. v. *United States*, 281 U.S. 385	8
Coleman v. *United States*, 152 U.S. 96	8
Cuba R.R. Co. v. *Crosby*, 222 U.S. 473	8
Perkins v. *Lukens Steel Co.*, 310 U.S. 113	11
Falcon Dam Constructors v. *United States*, 136 Ct. Cls. 358	7
Four Packages of Cut Diamonds v. *United States*, 256 Fed. 305	7
Grace Line, Inc. v. *United States*, Court of Claims, No. 218–58, decided November 1, 1961	6, 10
Moore-McCormack Lines, Inc. v. *United States*, 119 Ct. Cls. 473, certiorari denied, 342 U.S. 876	5, 7, 9
Standard Fruit and Steamship Co. v. *United States*, 103 Ct. Cls. 659	7, 8

Cases—Continued

	Page
Union Shipping and Trading Co. v. United States, 127 F. 2d 771	9
United Fruit Co. v. *United States*, 112 Ct. Cls. 303	8
United Fruit Co. v. *United States*, 112 Ct. Cls. 519	8

Statutes:

Act of September 2, 1960, § 12(c), 74 Stat. 725	2
Merchant Marine Act of 1936, § 405(a), 49 Stat. 1995, 46 U.S.C. (1958 ed.) 1145(a)	2, 6, 7, 10
28 U.S.C. 1502	7

Conventions:

Convention of the Postal Union of the Americas and Spain of December 22, 1936, 50 Stat. 1657	2
Convention of the Postal Union of the Americas and Spain of November 9, 1950, T.I.A.S. 2286, 2 U.S. Treaties (Pt. 2, 1951) 1362	3

Miscellaneous:

33 Ops. Atty. Gen. 276	7

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 519

MOORE-McCORMACK LINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion (Pet. App. A, 1–11) and findings of fact (Pet. App. A, 11–36) of the Court of Claims have not yet been reported.

JURISDICTION

The judgment of the Court of Claims dismissing petitioner's claim was entered on April 4, 1962, and a motion for new trial was denied on July 18, 1962. The petition for a writ of certiorari was filed on October 15, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims correctly found that petitioner had failed to prove that there was an implied promise by the United States to compensate it for mail carriage from South American ports.

2. Whether petitioner was entitled to recover because the Post Office had used foreign flag vessels to carry mail to South America, despite the preference given by the Merchant Marine Act to American flag vessels.

STATUTE AND CONVENTIONS INVOLVED

Section 405(a) of the Merchant Marine Act of 1936, 49 Stat. 1995, 46 U.S.C. (1958 ed.) 1145(a), provided[1]:

> All mails of the United States carried on vessels between ports between which it is lawful under the navigation laws for a vessel not documented under the laws of the United States to carry merchandise shall, insofar as practicable, be carried on vessels of United States registry.

The Convention of the Postal Union of the Americas and Spain of December 22, 1936 (approved by the President, August 20, 1937), 50 Stat. 1657, provided in pertinent part:

ARTICLE 3

Free and gratuitous transit

> 1. The gratuity of territorial, fluvial and maritime transit is absolute in the territory of the Postal Union of the Americas and Spain; consequently, the countries which form it obli-

[1] This section was subsequently repealed. Act of September 2, 1960, § 12(c), 74 Stat. 708, 725.

gate themselves to transport across their territories and to convey by the ships of their registry or flag which they utilize for the transportation of their own correspondence, without any charge whatsoever to the contracting countries, all that which the latter may send to any destination.

2. In cases of reforwarding, the contracting countries are bound to reforward the correspondence by the ways and means which they utilize for their own dispatches.

The Convention of the Postal Union of the Americas and Spain of November 9, 1950 (approved by the President, June 22, 1951), T.I.A.S. 2286, 2 U.S. Treaties (Pt. 2, 1951) 1362, provided in pertinent part:

ARTICLE 3

Free and gratuitous transit

1. The gratuity of territorial, fluvial and maritime transit is absolute in the territory of the Postal Union of the Americas and Spain; consequently the countries which form it obligate themselves to transport across their territories and to convey by ships of their registry or flag, without any charge to the contracting countries, all the correspondence which the latter may send to any destination whatsoever. However, this gratuity of transit will not be applied to the subsequent maritime transmissions of correspondence destined for a third country which is not a member of the Postal Union of the Americas and Spain in cases where a reshipment or transfer may be necessary, or justified expenses of handling may arise.

2. Likewise, when services of foreign Administrations are required for the subsequent conveyance of the closed mails, collection can be made from the Administrations of origin of the same amounts which the intermediary Administrations may be compelled to pay therefor.

3. In cases of onward dispatch, the contracting countries bind themselves to forward the correspondence by the most rapid ways and means which they utilize for their own mails.

STATEMENT

Petitioner, a domestic steamship company whose vessels fly the flag of the United States, has participated in the carriage of mails between ports of the United States and those of Uruguay, Brazil, and Argentina (Pet. App. A, 11–12, 21). In a previous action, it had sued the United States seeking to recover payment in compensation for the carriage from 1939 to 1942 of outgoing, northbound mails from the South American ports. The suit was based upon international postal conventions to which the United States was a signatory and by which this country had agreed, *inter alia*, that carriage of the mails from the South American signatories to the United States was to be provided free of charge by the United States to those countries.[2]

[2] Under the Conventions of the Universal Postal Union the United States was obligated to transport the mails tendered to it by the signatories and could then bill the signatories for collection (Commissioner's Finding 12, Pet. App. B, 11). Under the Convention of the Postal Union of the Americas and Spain of December 22, 1936 (see *supra*, pp. 2–3), and the Postal

Petitioner abandoned its entire claim for the mails from Argentina and the part of its claim to mails from Uruguay carried before 1940 because petitioner had agreed with these countries to carry mails from their ports free of charge in return for certain packet privileges.[3] The United States conceded liability as to the Uruguay mail carried after 1940. As to the mail from Brazilian ports, the parties agreed that a Brazilian decree was controlling and the Court of Claims held that this decree required petitioner to carry Brazilian mails gratuitously. *Moore-McCormack Lines, Inc.* v. *United States*, 119 Ct. Cls. 473, certiorari denied, 342 U.S. 876 (Pet. App. A, 1–2, 21–22).

After the interruption of service because of World War II, petitioner resumed the carriage of northbound and southbound mails in 1946 (Pet. App. A, 11–12). In 1956, petitioner again sued the United States claiming:

(1) $279,993.79 as compensation for the carriage during the years 1951 to 1956 of northbound mails, a service rendered by petitioner free of charge to the South American countries allegedly by virtue of the

---

Conventions of 1946 (61 Stat. 3505) and 1950 (*supra*, p. 3, the United States obligated itself to provide such mail transportation free of charge (Pet. App. A, 12–14).

[3] A packet is a vessel conveying dispatches, mails, passengers, and goods, having fixed sailing days (Brief of Plaintiff in the Court of Claims, p. 10). The privileges accorded included preferential anchorage and berthing, exemptions from certain taxes, and rebates on various fees. See, *e.g.*, *Moore-McCormack Lines, Inc.* v. *United States*, 119 Ct. Cls. 473, 484, certiorari denied, 342 U.S. 876; Pet. App. A, 9, 32.

United States' participation in international postal conventions;

(2) $8,858.61 for the transportation of incoming mail from dockside to the United States Post Office;

(3) $283,974.11 for loss of revenues resulting from the Post Office Department's failure to utilize petitioner's services, rather than those of flag vessels of other signatory nations, in carrying southbound mails. Petitioner argued that, by statute, the Department was obliged to prefer a United States company's services to those of foreign companies with respect to all outgoing mail from the United States (Pet. App. A, 2).

The Court of Claims found that the evidence offered by the United States showed that under the laws of Uruguay, Brazil, and Argentina, petitioner was required to carry the mails free of charge in return for packet privileges which, at least in respect to Uruguay and Argentina, it had sought and received (Pet. App. A, 7–10, 27–34). This required carriage included delivery to the pertinent U.S. Post Office (Pet. App. A, 10, 35). The court also relied on its recent ruling in *Grace Line, Inc.* v. *United States,* No. 218–58, decided November 1, 1961, in holding that Section 405(a) of the Merchant Marine Act of 1936, 49 Stat. 1995, 46 U.S.C. (1958 ed.) 1145(a), did not require the Post Office Department to give American steamship companies a 100 percent preference to foreign companies, but rather was an expression of Congressional policy (Pet. App. A, 10–11; see also Pet. App. A, 35–36). Thus, the Court of Claims concluded that petitioner had shown no basis for recovery against

the United States, and its petition was dismissed (Pet. App. A, 11, 36).

ARGUMENT

In holding that petitioner was not entitled to compensation for the carriage of mail from South American ports to the United States, the court below correctly applied settled principles of law to the facts it found. The rejection of petitioner's claim based upon Section 405(a) of the Merchant Marine Act was equally correct and does not conflict with holdings of any other court. Accordingly, no question is presented meriting review by this Court.

1. Petitioner claims (Pet. 12–16, 19–24, 25–29) that the United States impliedly promised in international postal conventions [4] to compensate it for its mail services to other signatory countries. Before rendering the services here involved, however, petitioner was on notice that free mail services required by the foreign countries in return for packet privileges would not be compensated by the United States. See, *e.g.*, *Moore-McCormack Lines, Inc.* v. *United States*, 119 Ct. Cls. 473, certiorari denied, 342 U.S. 876. The Court of Claims has repeatedly held that steamship companies cannot recover against the United States

[4] If the postal conventions were treaties, the Court of Claims would have lacked jurisdiction. 28 U.S.C. 1502; *Falcon Dam Constructors* v. *United States*, 136 Ct. Cls. 358, 364–365. However, such conventions have been held to be executive agreements, being in effect part of the postal laws and regulations of the United States. See *Four Packages of Cut Diamonds* v. *United States*, 256 Fed. 305, 306 (C.A. 2); *Standard Fruit and Steamship Co.* v. *United States*, 103 Ct. Cls. 659, 682; 33 Ops. Atty. Gen. 276, 278.

on a theory of implied contract if they have notice that the United States has denied liability. *United Fruit Company* v. *United States*, 103 Ct. Cls. 303, 312, 313; *United Fruit Company* v. *United States*, 112 Ct. Cls. 519, 531; *Standard Fruit and Steamship Co.* v. *United States*, 103 Ct. Cls. 659, 682–684. As this Court has held, in order to prove the existence of a contract implied in fact, it must be demonstrated that the petitioner performed its services with a reasonable expectation of payment. *Colgman* v. *United States*, 152 U.S. 96, 99; *Balt. & Ohio R.R.* v. *United States*, 261 U.S. 592, 598; *Chesapeake &c. Tel. Co.* v. *United States*, 281 U.S. 385, 388. Thus, the critical question below was whether petitioner's services to Uruguay, Brazil, and Argentina were required by those countries to be without charge.

The court below found as facts[5] that the laws of the South American countries here involved required petitioner to carry outgoing mails free of charge in return for packet privileges, and that petitioner sought and received these privileges (see Pet. App. A, 6–9).[6] Petitioner has not demonstrated that these

[5] The extent of foreign law is a question of fact. *Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473, 479–480.

[6] The Court of Claims said (Pet. App. A, 9–10) that there was no proof that petitioner received packet privileges from Brazil during the period for which payment is sought for the carrying of mail. The court, however, held that the burden was on petitioner to prove that the United States had made an implied promise. Consequently, for purposes of this case, petitioner must be assumed to have received packet privileges from Brazil.

findings are not supported by the evidence.[7] As we have seen, petitioner was on notice that the United States would not pay for mail carriage which South American countries required to be performed free of charge. Consequently, no contract may be implied. Furthermore, these findings show, as the Court of Claims held, that petitioner has already been otherwise compensated for the carriage of mail by the three South American countries. Petitioner cannot claim that it is entitled to additional compensation in the absence of some clear agreement for such payment.

Petitioner contends that the postal conventions are inconsistent with the South American requirements for free carriage and that therefore these requirements are invalid. The fact remains, however, that the South American countries insisted on this requirement, petitioner asked for packet privileges subject to it, and petitioner was on notice that the United States

[7] Petitioner contends (Pet. 28–29) that the Court of Claims erred in relying on its earlier decision in *Moore-McCormack Lines, Inc.* v. *United States*, 119 Ct. Cl. 473, which held that the law of Brazil requires free carriage of mail in return for packet privileges. Petitioner argues that the decision was based on a mistake of fact concerning the meaning of Brazilian law and that, in any event, the law is no longer valid because it is inconsistent with the new Brazilian constitution. However, on a motion for a new trial in the original *Moore-McCormack* case the Court of Claims reviewed petitioner's contention that it had made a mistake in its decision and found, we believe correctly, that no mistake had been made. 119 Ct. Cls. 485–486. And the constitutionality of a Brazilian law is not reviewable in an American court. *Banco de Espana* v. *Federal Reserve Bank*, 114 F. 2d 438, 443–444 (C.A. 2); see *Union Shipping & Trading Co.* v. *United States*, 127 F. 2d 771, 774 (C.A. 2).

would not pay compensation to mail carriers who received packet privileges from countries where this requirement existed. Moreover, the validity of South American laws under international conventions cannot be determined by an American court. Cf. *Banco de Espana* v. *Federal Reserve Bank*, 114 F. 2d 438, 443–444 (C.A. 2). And certainly the United States cannot be held financially liable if the State Department does not insist upon all the conceivable rights to which the United States may be entitled under international conventions.

2. There is no greater merit to petitioner's claim (Pet. 16–19, 21–25) based upon an alleged violation of the statutory preference contained in Section 405(a) of the Merchant Marine Act. This contention fails for three reasons.

First, Section 405(a) gave preference to United States flag vessels only "insofar as practicable." As the court below correctly recognized in *Grace Line, Inc.* v. *United States*, decided November 1, 1961, this was a Congressional declaration of policy which did not constitute an absolute prohibition against the transportation of mail from the United States to South American ports by vessels of foreign registry. Since transportation by the South American vessels was free of charge to American taxpayers by virtue of the postal conventions, the Post Office reasonably decided to follow this procedure. Second, as the Court of Claims also pointed out in *Grace Line*, even assuming that the statute were more than a Congressional declaration of policy, it did not entitle one United States steamship company, as opposed to

others of American registry, a 100 percent preference for itself. Thus, petitioner has no basis for claiming it was entitled to all, or even any particular part, of the mail carried by foreign vessels. Third, petitioner had no standing to enforce an alleged contractual preference. In *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, this Court held that potential contractors with the government had no standing to challenge the wage rates which the government was requiring in government contracts, on the ground that the executive branch has full discretion over contracting. Similarly, here, petitioner had no standing to challenge the decision of the Post Office as to which shipping company it would contract with.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

ALAN S. ROSENTHAL,
DAVID J. MCCARTHY, JR.
Attorneys.

NOVEMBER 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1962